

IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA.

Don Lincoln Lionel Wijesinghe
No.179, Hill Street, Dehiwala.

Plaintiff

Vs.

C.A. Appeal No.1175/99(F)

D.C. Mt. Lavinia Case No. 2197/P

1. Hettitantrige Dona Pathmawathie
Mallika Abeygunawardena,
No.178/1, Hill Street, Dehiwala.
2. Hettitantrige Dona Sumanawathie
Dharmatilleke,
No.40/3, Attidiya Road, Ratmalana
3. Hettitantrige Dona Suwineetha
Mayurawathie Kapugeekiyana
No.96, Bangalawatte, Pannipitiya
4. Hettitantrige Don Jayantha Sri
Ananda Perera,
5. Sujatha Perera
6. Hettitantrige Don Sumedha Perera
7. Hettitantrige Dona Hashanthi Perera
8. Hettitantrige Dona Krishanthi Perera
All of No. 40/3, Attidiya Road,
Ratmalana
9. Ruby Rosalin Perera
10. Hettitantrige Kapila Haritha Perera
11. Hettitantrige Dona Uditha Manjalie
Perera.

12. Hettitantrige Dona Deepthi Nandika
Perera.
13. Hettitantrige Don Ajith Nandana
Perera.
14. Hettitantrige Dona Uroma
Bandumathie Perera.
All of No.130, Hill Street, Dehiwala
15. Haputantrige Don Ananda Mangala
Meewanaplana
No.21, Huludagoda Road, Mount
Lavinia
16. Haputantrige Dona Indrani Chinta
Devendra Meewanapalana
No.21, Huludagoda Road, Mount
Lavinia
17. Haputantrige Don Ashoka
Chandrawansa Meewanapalana
No.21, Huludagoda Road, Mount
Lavinia
18. Haputantrige Dona Manel Ranjanie
Wijesiriwardena.
No.21, Huludagoda Road, Mount
Lavinia
19. Haputantrige Dona Shivanthimala
Meewanapalana.
No.21, Huludagoda Road, Mount
Lavinia
20. Don Neville Wijesinghe
No.178, Udupila, Delgoda
21. Don Bernard Wijesinghe (Deceased)
No.587/1D, Thambigewatte,
Madiwela Road, Thalawatugoda

- 21A. Lalith Candrasiri Wijesinghe
No. 567/1D Thambigewatte, Madiwela
Road, Thalawatugoda
22. Wanniarachchige Don Stanley
Tiliekeratne
'Sri Nagar' , Mirihana, Nugegoda.

Defendants

AND

Kandanarachchige Chandra Malani
Gunaratne Batugedara,
Jubilimawatha, Mirihana, Nugegoda.

Substituted 22nd Defendant-

Appellant

Vs.

Don Lincoln Lionel Wijesinghe

(deceased)

No.179, Hill Street, Dehiwala.

Plaintiff-Respondent

1. Hettitantrige Dona Pathmawathie
Mallika Abeygunawardena,
No.178/1, Hill Street, Dehiwala.
2. Hettitantrige Dona Sumanawathie
Dharmatilleke,
No.40/3, Attidiya Road, Dehiwala
3. Hettitantrige Dona Suwineetha
Mayurawathie Kapugeekiyana
No.96, Bangalawatte, Pannipitiya
4. Hettitantrige Don Jayantha Sri
Ananda Perera,
5. Sujatha Perera

6. Hettitantrige Don Sumedha Perera
7. Hettitantrige Dona Hashanthi Perera
8. Hettitantrige Dona Krishanthi Perera
All of No. 40/3, Attidiya Road,
Ratmalana
9. Ruby Rosalin Perera
10. Hettitantrige Kapila Haritha Perera
11. Hettitantrige Dona Uditha Manjalie
Perera.
12. Hettitantrige Dona Deepthi Nandika
Perera.
13. Hettitantrige Don Ajith Nandana
Perera.
14. Hettitantrige Dona Uroma
Bandumathie Perera.
All of No.130, Hill Street, Dehiwala
15. Haputantrige Don Ananda Mangala
Meewanapalana
No.21, Huludagoda Road, Mount
Lavinia
16. Haputantrige Dona Indrani Chinta
Devendra Meewanapalana
No.21, Huludagoda Road, Mount
Lavinia
17. Haputantrige Don Ashoka
Chandrawansa Meewanapalana
No.21, Huludagoda Road, Mount
Lavinia
18. Haputantrige Dona Manel Ranjanie
Wijesiriwardena.
No.21, Huludagoda Road, Mount
Lavinia

19. Haputantrige Dona Shivanthimala
Meewanapalana.
No.21, Huludagoda Road, Mount
Lavinia
20. Don Neville Wijesinghe
No.178, Udupila, Delgoda
- 21A. Lalith Candrasiri Wijesinghe
No. 567/1D Thambigewatte, Madiwela
Road, Thalawatugoda

Defendant-Respondents

BEFORE

A. W. A. SALAM, J.

COUNSEL

Dr. Sunil Cooray for the substituted 22nd
Defendant-Appellant Gamini Marapana P.C.
with Navin Marapana for the Plaintiff-
Respondent

ARGUED ON

29.11.2010, 21.02.2011, and 01.04.2011

DECIDED ON

: 22.08.2011

A. W. A. SALAM, J.

The plaintiff filed action for partition of Lot H depicted in preliminary plan No 681 the identity of which was undisputed. In terms of the plaint, undivided rights from and out of the corpus were to be distributed among the plaintiff and 1st to 21st defendants. There was no contest regarding the devolution of title either.

The 22nd defendant was admittedly not a co-owner of the corpus but made a party to the action, based on the purported assertion of title to the whole land on a deed of gift bearing No 498 dated 12 October 1962 produced as 22D2.

The pivotal question as to whether the 22nd defendant had acquired a valid prescriptive title to the entire land was answered by the trial judge in the negative and consequently interlocutory decree was entered for partition of the corpus among the co-owners who were declared entitled to undivided rights. The parties who were thus declared entitled as co-owners were the plaintiff and 1st to 21st defendants. Aggrieved by the interlocutory decree the 22nd defendant has preferred the present appeal.

The 22nd defendant relied on deed of gift No 498 dated 12 October 1962 produced as 22D2 and his long and continued possession of the subject matter in proof of his

prescriptive title. By 22D2 Percy Batugedara gifted the subject matter of the partition action to the 22nd defendant who incidentally is his son-in-law.

In this background, the real crux of the issue was whether the 22nd defendant had acquired a valid prescriptive title to the subject matter of the action as asserted by him or whether he was a mere licensee of the plaintiff's predecessors in title as stressed by the plaintiff and 1st to 21st defendants. It was the position of the plaintiff that the 22nd defendant was the speaker of the National State Assembly at or around the time he entered into possession of the corpus and he was a close relative of the plaintiff. Despite the 22nd defendant was in long and continued possession, as is accepted by the district judge there was no semblance of any adverse possession.

Conversely, the 22nd defendant urged that the following improvements effected by him on the subject matter ought to have been considered by the learned trial judge as improvements strengthening his prescriptive claim. Some of the improvements effected by him are as follows...

1. Construction of a retaining wall around the corpus.
2. Filling the corpus with earth.
3. Construction of a boundary wall with an iron gate.
4. Landscaping the corpus with two ponds.
5. Construction of a permanent building on the

corpus consisting of an office room, two other rooms and a kitchen.

It is common ground that Percy Batugedara had no paper title to lot "H" when he purportedly gifted it to the 22nd defendant on 22D2. As a matter of fact, Percy Batugedara had executed the deed of gift in favour of the 22nd defendant on 12 October 1962, barely three years after the demise of Don David. It is to be observed that no evidence whatsoever was adduced by the 22nd defendant to establish the prescriptive title of Percy Batugedara prior to the execution of 22D2. Hence, it is quite appetent that Percy Batugedara could not have prescribed to the corpus as at the date of 22D2, although the 22nd defendant had incorrectly stated in his evidence that Percy Batugedara had prescribed to the subject matter against Don David.

As far as the deed of gift (22D2) is concerned, a glaring infirmity appears to be the imprecise nature of the deed which lacks in clarity. In that deed the Donor has deliberately omitted to recite his title and/or suppressed the mode of acquisition of title. If Percy Batugedara had acquired ownership to the subject matter by reason of his long and prescriptive possession, admittedly there was nothing that prevented him from reciting the title as such.

Percy Batugedara was no stranger to transactions relating to alienation of immovable properties. The 22nd defendant as at the date of execution of 22D2 was a lawyer. Both of them were aware

of the death of Don David three years prior to the execution of 22D2. In this background, it remains a complete mystery as to what made the donor to choose not to make any reference to the prescriptive possession as the mode of acquisition of his title or for the failure of the donee to insist on the disclosure of the donor's title. It is trite law that silent possession without any act of ouster cannot be construed as adverse possession. In the case of a licensee mere possession however much exclusive or long-continued it may be, if silent, no prescriptive benefit would accrue to him.

As has been submitted by the learned president's counsel several important principles touching upon the law of prescription have been succinctly laid down in the celebrated judgment in *Corea Vs Iseris Appuhamy* 15 NLR 65. It is thus laid down where a person enters into possession of land in one capacity, he is presumed to continue in possession in that same capacity. The head note of that judgment which applies to licensees with necessary changes reads as follows....

“A co-owner's possession is in law the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result”.

In the case of *Thilakaratra Vs Bastian* 21 NLR 12 it was held *inter alia* that where possession of immovable property originally

is not adverse, and in the event of a claim that it had later become adverse, the onus is on him who asserts adverse possession to prove it. Then proof should be offered not only of an intention on his part to possess adversely, but a manifestation of that intention to the true owner against whom he sets up his possession.

Quite remarkably, overwhelming evidence had been led in the original court pointing to the 22nd defendant's possession as being one of leave and licence under Don David which was later continued with the permission of the administrator of his estate. The evidence relating to the leave and licence granted to them has been accepted by the learned district judge after careful scrutiny. When the legal principle set out above is applied to the proved facts in this case, I do not think it can be gainsaid that the possession of Percy Batugedara and his son-in law is essentially referable to the lawful right to possess the subject matter granted by the owner of the subject matter and his agent. By reason of their having commenced possession of the land in question in this manner, it is incumbent to presume that they continued to possess the property in the same capacity. As has been submitted by the learned President's counsel, the possession of the 22nd defendant and his father-in-law should necessarily be presumed to have continued as licensees or permissive users until they distinctly prove that their title changed.

As the 22nd defendant had entered the property as a licensee, the onus of proving that his possession has become adverse is fairly and squarely on him and he is expected to establish this by adducing cogent evidence of ouster. Upon a careful analysis of the evidence led at the trial including that of the 22nd defendant, I find it difficult to endorse the view of the 22nd defendant that the learned trial judge had erred in coming to the conclusion that the 22nd defendant had not established his prescriptive claim.

Basically the plaintiff's case was that the two original owners of the corpus had transferred their rights by P2 to Don David in the year 1950. Don David and Percy Batugedara were first cousins and the latter had purchased lot "I" which is the land immediately adjacent to the corpus on the western boundary almost at the same time when Don David purchased rights in the corpus.

The main witness who testified on behalf of the plaintiff at the trial was one Don Neville Wijesingha. The relationship of witness Wijesingha is worthy of attention. He is the nephew of Don David and to be more precise the son of Charlotte Helana Wijesingha who is a sister of Don David. One of the subscribing witnesses to P2 was Percy Batugedara who had been asked to look after the property and pay taxes.

Don David had passed away in 1959 and the administrator of his estate was Neville Wijesingha. No claim has been made by Percy Batugedara to the corpus during the pendency of the

testamentary case in which the estate of Don David had been administered. The learned trial judge has considered the failure on the part of the 22nd defendant and Percy Batugedara make such a claim as unfavourable to the prescriptive claim the former sought to set up in this case.

The 22nd defendant contended that to obtain title by prescription the possession of the 22nd defendant must be taken as possession of the owner and not as possession under the owner, such as tenant or licensee or some other subordinate capacity. He claims that the 22nd defendant commenced his possession with deed of gift No 498 dated 22nd of October 1962 in his favour and that he entered into possession as the owner. As his deed is duly registered, the learned counsel has urged that such registration is notice to the whole world as to his ownership.

In *Corea v. Iseris Appu* (1911) 15 N. L. R . 65], the Privy Council stated the law with regard to prescription among co-owners in the following terms and the statement of law is equally applicable to a licensee as well. The relevant passage from the judgment reads as follows..

“His possession was in law the possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result.”

Even though 22D2 had been registered at the land registry it cannot be taken as the Donor or Donee having made their intention known to the owner. The authorities clearly state that deeds executed secretly and unknown to the owner cannot be considered as a starting point in prescription.

As regards the first argument that the 22nd defendant had entered the subject matter as the owner, it must be emphasized that he has entered the land as the successor in title of Percy Batugedara. As such he cannot have or expected to have a better title than what his predecessor held. Percy Batugedara was the first cousin of David. The relationship between both of them was so close that both of them have purchased the two adjacent lots at one and the same time. Further, Batugedara has been requested to take the produce, look after the land and pay the taxes. The learned district judge has accepted this evidence as being quite probable. The evidence of Neville Wijesingha had sounded very convincing to the learned district judge. Having perused evidence of Neville Wijesingha, I am not inclined to take a different view with regard to the credibility attached to the evidence of Wijesingha, for the reason that the learned district judge has heard the witness testifying from the witness box and observed his demeanour while giving evidence.

If Percy Batugedara was a mere licensee his deed in favour of the 22nd defendant could only place the latter in the same capacity as Batugedara was in relation to the land. The mere

registration of the deed in the proper folio cannot be taken as evidence to strengthen his alleged prescriptive possession.

The learned trial judge has accepted the evidence adduced on behalf of the plaintiff that Percy Batugedara sought permission of Neville Wijesingha, the plaintiff's brother, in the presence of the 22nd defendant, to put up a temporary garage on the subject matter of the action. In my view the appellant has not been able to impress upon this court that the finding of the learned district judge on that account is incorrect and/or had ended up in a miscarriage of Justice.

In deciding the issue relating to the leave and licence granted to the 22nd defendant, the learned district judge has taken into account the position held by the 22nd defendant, as the speaker of the National State Assembly and the fact that he was not only close but an influential and trusted relative of the plaintiff. This approach of the learned district judge cannot be faulted when she finally decided the issue relating to prescription.

The 22nd defendant had sought the permission of Neville Wijesingha to dump debris from a building that stood on the adjacent Lot "I". The 22nd defendant had also sought permission to build a boundary wall along the land in suite for purpose of his own security at a time when his personal security was an issue. According to the evidence as accepted by the learned district judge, Neville Wijesingha had no reason to doubt the *bonafides* 22nd defendant when he sought permission to build the parapet wall around the corpus, as he was the

speaker of the National State Assembly at the time. As regards the several occasions on which permission of Neville Wijesingha had been sought by the 22nd defendant and/or Batugedara and the consequences have been sufficiently dealt by the learned district judge.

Undoubtedly the evidence to establish prescription was slender, despite the length of possession. The facts that Batugedara was a close relative of Don David and that he was a signatory to P2, render it rather improbable to make his possession adverse in the strict sense of the law, particularly while proceedings to administer the estate of Don David were yet pending. Although the 22nd defendant has had possession of the corpus for an uninterrupted period of more than 10 years, such possession when examined in the light of the circumstances peculiar to this case, cannot be considered as adverse possession. Moreover the learned trial judge does not appear to have in any way misdirected herself, or applied the wrong standard or test in order to decide whether the ingredients to constitute adverse possession had been proved. In the absence of any error in law, which in my opinion, the 22nd defendant has failed to demonstrate, the trial judge's finding on the disputed issue in no way disturbing or shocks the sense of right and wrong.

For the foregoing reasons, I am of the opinion that the 22nd defendant is unable succeed on the issue of prescriptive title and hence his appeal merits no favourable consideration. As such, I am compelled to affirm the interlocutory decree entered

in the district court and accordingly dismiss the appeal. The appellant is entitled to recover the costs of this appeal from the substituted 22nd defendant-appellant.

Judge of the Court of Appeal

Kwk/-